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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 488

JAMES KEMP,

Appellant,

vs.

STATE OF SOUTH DAKOTA

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

STATEMENT OPPOSING JURISDICTION

SIGURD ANDERSON,
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Counsel for Appellee.

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IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs.

JAMES KEMP,
Defendant and Appellant

STATEMENT OF APPELLEE IN OPPOSITION TO NOTING JURISDICTION ON APPEAL

In opposition to assuming jurisdiction of this appeal and to noting jurisdiction thereof the appellee asserts that there is no substantial constitutional question arising either under the Federal Constitution or the treaties or laws of the United States present on this appeal. The mere reference to provisions of the Federal Constitution or treaties or laws of the United States, or the mere assertion of a claim thereunder is insufficient to authorize this Court to note jurisdiction of the appeal. *Sugarman* v. *U. S.*, 249 U. S. 182.

Jurisdiction on this appeal should not be noted for the further reason that all of the questions sought to be raised by the appellant—arising either under the Federal Constitution, the treaties or the Federal Statutes referred to in his statement—have heretofore been fully, adequately and completely disposed of and adjudicated by the Supreme Court of the United States. *A. Magnano Company* v. *Hamilton*, 292 U. S. 40; *McCray* v. *United States*, 195 U. S. 27; *Hammond Packing Co.* v. *Montana*, 233 U. S. 331;

Capitol City Dairy Co. v. *Ohio*, 183 U. S. 238; *Quong Wing* v. *Kirkendall*, 223 U. S. 59.

The Supreme Court of the State of South Dakota, in disposing of the questions arising under the Federal Constitution and the Migratory Bird Act, placed great reliance on the cases of *Geer* v. *Conn.*, 161 U. S. 519; *McCready* v. *Va.*, 94 U. S. 391, and *Patsone* v. *Pa.*, 232 U. S. 137.

In the *Geer* case the Supreme Court of the United States fully sustained the right of a state to regulate the taking and disposition of wild life within its borders upon the theory that such wild life belonged to the public, for the benefit of the inhabitants of the state, and that non-residents denied the privilege of hunting or fishing therein could not claim infringement in violation of the privilege and immunities clause of the Federal Constitution. The decision in the *Geer* case was merely a reiteration of a rule previously adopted in the case of *McCready* v. *Virginia.*

Following the adoption of the convention entered into with Great Britain for the purpose of preserving migratory wild life Congress enacted legislation popularly known as the Migratory Bird Act. In sections 703-711, Title 16, USCA, Congress passed the necessary legislation to put the treaties in operation within the several states, and in Section 708 preserved the right of the state to fully legislate with reference to migratory water fowl, provided such legislation or regulation adopted thereunder did not extend or enlarge upon the hunting and shooting privileges limited by Federal Acts, and Regulations.

It has long been the accepted doctrine in South Dakota that wild life, whether game bird, game animal or game fish, was the property of the state and that no person should at any time or in any manner acquire any property in, or subject to, his dominion; or control any game bird, game animal or game fish, or any part thereof, except by killing,

catching or taking the game in the manner provided by law and for the purposes authorized by law during the periods when their killing is not prohibited. Section 25.0411, SDC 1939.

The appellant, in his statement as to jurisdiction, relies upon a permission received from the owner of land located in South Dakota, upon which he entered, and there shot a specie of migratory water fowl belonging to the goose family. He then had in his possession a non-resident hunting license issued by the State of South Dakota, which license—under the regulations then in effect—authorized him to hunt certain specie of upland game bird, as designated by the regulations of the South Dakota State Game and Fish Commission. Attached to this non-resident hunting license was a Federal Duck Stamp for the current season. There was then in force and effect in South Dakota a statute, the validity of which is not questioned by the appellant's statement of jurisdiction, nor was it questioned in the trial of this case in the lower court in South Dakota or on appeal to the Supreme Court of South Dakota. This act is Section 1 of Chapter 90 of the South Dakota Session Laws of 1949 and provides that any bona fide resident of the state, who desires to hunt, take or kill migratory water fowl, shall first procure and attach to his game bird license a special stamp, the fee for which is $1.00. During the hunting season of 1949 no one was authorized to legally kill a specie of migratory water fowl in South Dakota without first having in his possession a resident hunting license, with a special South Dakota Duck Stamp attached thereto. The requirement with reference to the South Dakota Duck Stamp was in addition to the migratory water fowl stamp required by the Federal Statutes. The appellant has not questioned the right of the South Dakota legislature to require this additional stamp and the constitutionality of this act is not questioned.

The provisions with reference to issuance of resident and non-resident hunting licenses by the South Dakota Game and Fish Commission are found in Chapter 91 of the South Dakota Statutes of 1949, amending Section 25.0306, SDC 1939, Subsection (1) of Section 1 of the act provides that no resident license shall be granted unless the applicant has been a bona fide resident of the state for at least six months prior to the making of the application, and Subsection (9) of the act provides that no license shall be issued to a non-resident for the hunting, taking or killing of any migratory water fowl. Section 25.0301 specifically prohibits any person from exercising any of the rights or privileges which are permitted under a hunting license unless such person is the owner of such license.

Conceding, for the purposes of this argument, that the appellant's contention with reference to the unconstitutionality of Subsection (9) of Section 1 of Chapter 91 of the South Dakota Laws of 1949 are invalid, the appellant stands convicted of shooting a goose without a license, in violation of Section 25.0301, SDC 1939, the constitutionality of which is not questioned by this appeal.

In support of his statement as to the jurisdiction of the Supreme Court of the United States to hear this appeal, the appellant has cited the cases of *Toomer* v. *Witsell*, 334 U.S. 385, and *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410, and *Missouri* v. *Holland*, 252 U. S. 416, none of which are either applicable or in any way sustain the position taken by him in this appeal. In the case of *Missouri* v. *Holland* the Supreme Court of the United States sustained the constitutionality of regulatory legislation passed by Congress under the authority of the Migratory Bird Act.

In the *Toomer* v. *Witsell* and *Takahashi* v. *Fish and Game Commission* cases the question of commercial rights and the

interstate commerce clause were involved. The *Toomer* v. *Witsell* case had to do with discriminatory legislation against non-residents who wished to engage in commercial shrimp fishing, and the *Takahashi* v. *Fish and Game Commission* case had to do with deep sea commercial fishing. The commerce clause of the Constitution, which is not involved in the present appeal, was the controlling factor in the decisions of the United States Supreme Court in the two cases last cited.

The right of the State of South Dakota to enact legislation such as that complained of as unconstitutional by the appellant in this proceedings was fully sustained by the Supreme Court of the United States in the case of *Carey* v. *South Dakota,* 250 U. S. 118. In that case Carey, a non-resident of South Dakota, had legally killed migratory water fowl under a non-resident hunting license and was prosecuted by the State of South Dakota under a statute which prohibited the shipment or transportation by private or common carrier without the state of game birds, including migratory water fowl. The Supreme Court of the United States, in sustaining the constitutionality of the South Dakota statutes in question, said: "The prohibition of the Federal Act is limited to the provision that the birds shall not be destroyed or taken contrary to regulations. The regulations merely prescribed the closed seasons."

So long as state legislation does not conflict with the provisions of the Migratory Bird Treaties, Federal legislation and regulations adopted thereunder, the right of the state to regulate and control the taking of migratory birds within its borders exists unimpaired. Sections 708 and 715h, Title 16, USCA.

The appellee respectfully submits that the decision of the Supreme Court of the State of South Dakota in this case should not be reviewed on appeal in the Supreme

Court of the United States for the reason that all of the issues involved in this case have already been fully and adequately disposed of by decision of the United States Supreme Court, referred to herein.

Respectfully submitted,

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Pierre, South Dakota.